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COMMENTS ON THE ECTHR DECISION IN VEREIN KLIMASENIORINNEN SCHWEIZ AND OTHERS V. SWITZERLAND ON 9 APRIL 2024

Abstract: On 9 April 2024, the European Court of Human Rights (ECtHR) delivered three highly anticipated decisions in climaterelated cases: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *Carême v. France* and *Duarte Agostinho and Others v. Portugal and 32 states*. The Court declared the latter two applications inadmissible but examined the merits in *KlimaSeniorinnen*. Unlike earlier environmental cases before the ECtHR, these complaints did not concern discrete sources of pollution; they challenged inadequate state responses to the systemic threat of anthropogenic climate change. In *KlimaSeniorinnen* the Court relied on its 'living instrument' doctrine to interpret the European Convention on Human Rights (ECHR) in light of contemporary challenges. It found that Switzerland's failure to adopt and implement effective climatemitigation and adaptation measures breached its positive obligations under Article 8 (right to respect for private and family life). The judgment clarified the scope of substantive obligations, a demanding test for victim status, and a novel approach to causation and burden of proof. It also distinguished between a reduced margin of appreciation for setting climate goals and a broader margin for choosing means, and emphasised procedural safeguards and democratic participation. This article examines the facts, reasoning and broader implications of *KlimaSeniorinnen*, critiques aspects of the Court's approach to victim status and judicial activism, and assesses what the decision means for future strategic climate litigation.

Keywords: climate change, state responsibility, positive obligations, health and well-being, 'living instrument' doctrine, victim status, GHG emissions, ECtHR, ECHR

1. Introduction

On 9 April 2024, the eagerly awaited decisions of the European Court of Human Rights (ECtHR) in three climate cases were delivered: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*,[41] *Carême v. France*[42] and *Duarte Agostinho and Others v. Portugal and 32 countries*.[43] The latter two applications were declared inadmissible, but the *KlimaSeniorinnen* case was assessed on the merits.

Unlike previous classic environmental cases that the ECtHR has had occasion to consider, these three complaints did not concern specific problems of pollution or different types of environmental nuisance (e.g. emissions from waste treatment plants, factories or other enterprises;[44] air pollution by sodium cyanide from gold mines;[45] adverse environmental effects of a coal mine[46] or noise pollution from airports[47] or motorways[48]), but state responsibility for violations of the rights and freedoms guaranteed by the European Convention on Human Rights (ECHR) resulting from the lack or inadequate response to the adverse effects of climate change.

The *KlimaSeniorinnen* case met with great interest already during the procedure (via an unprecedented number of intervening parties) and afterwards (comments from the academia, experts, different media, international organizations and civil society), with reactions ranging from cheerful applause to heavy critique. It thus seems worthwhile to highlight some facts, debunk myths and misinterpretations that appeared in the public discourse.

To begin with, it needs to be stressed that the *KlimaSeniorinnen* judgment did not concern state responsibility for climate change as such, nor

41 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024.

42 *Carême v. France*, [GC], no. 7189/21, decision of 9 April 2024.

43 *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], no. 39371/20, decision of 9 April 2024.

44 C.f. *López Ostra v. Spain*, no. 16798/90, judgment of 9 December 1994; *Guerra and Others v. Italy*, no. 14967/89, judgment of 19 February 1998; *Fadeyeva v. Russia*, no. 55723/00, judgment of 9 June 2005; *Cordella and Others v. Italy*, nos. 54414/13 and 54264/15, judgment of 24 January 2019.

45 *Tătar v. Romania*, no. 67021/01, judgment of 27 January 2009.

46 *Dubetska and Others v. Ukraine*, no. 30499/03, judgment of 10 February 2011.

47 C.f. *Powell and Rayner v. the United Kingdom*, no. 9310/81, judgment of 21 February 1990; *Hatton and Others v. the United Kingdom*, [GC], no. 36022/97, judgment of 8 July 2003.

48 C.f. *Deés v. Hungary*, no. 2345/06, judgment of 9 November 2010; *Kapa and Others v. Poland*, and 3 Others, nos. 75031/13, judgment of 14 October 2021.

for not respecting international obligations other than the ECHR. Secondly, climate change is a global and transboundary challenge that started decades ago; it would thus be impossible to establish state responsibility for these past tendencies. It should thus be highlighted that the commented judgment concerned current steps and actions undertaken by Switzerland to tackle climate change and its negative consequences. Its essence can be summarized as an answer to the question of whether states are responsible under the ECHR for the negative consequences of climate change on the enjoyment of the Convention's rights, in particular, the right to life and the right to private and family life (its substantive scope covers health and well-being).

The *KlimaSeniorinnen* judgment is extremely complex and raises important theoretical and practical questions related to, amongst others, the scope and nature of positive obligations, victim status requirement, the principle of subsidiarity, separation of powers and judicial activism, methods of interpretation of the ECHR, the margin of appreciation doctrine, causation and the role of scientific evidence. All these issues are briefly addressed in the article, but deserve further in-depth analysis and reflection. In final remarks, I make an attempt to present important future implications of the judgment, also from a broader perspective of the recent developments in international climate change strategic litigation.

2. Facts of the Case[49]

The applicants were, on the one hand, Verein KlimaSeniorinnen Schweiz, an association under Swiss law established to promote and implement effective climate protection on behalf of its members, who are more than 2,000 older women (one-third of whom are over 75) and, on the other, four women, all members of the association and aged over 80, who complain of health problems that are exacerbated during heatwaves, significantly affecting their lives, living conditions and well-being. On 25 November 2016, under section 25a of the Federal Law on administrative procedure, the applicants submitted a request to the Federal Council and other Swiss environmental and Energy authorities, pointing to various failings in the area of climate protection and seeking a decision on actions to be taken (Realakte). They also called on the authorities to take the necessary measures

49 Summary of the facts based on a Press Release issued by the Registrar of the Court, ECHR 087 (2024).

to meet the 2030 goal set by the Paris Agreement in 2015. The final domestic judgment in the case was delivered on 5 May 2020 by the Federal Supreme Court which dismissed an appeal, finding that the individual applicants were not sufficiently and directly affected by the alleged failings in terms of their right to life under Article 10(1) of the Constitution (and Article 2 ECHR), or their right to respect for private and family life, including respect for their home (Article 8 ECHR), in order to assert an interest worthy of protection within the meaning of section 25a of the Federal Law on administrative procedure. As regards the applicant association, the Federal Supreme Court, given its finding with respect to the individual applicants, left open whether it had standing to lodge the appeal at all.

In the application before the ECtHR, the applicants complained of various failures by the Swiss authorities to mitigate the effects of climate change, and in particular the effect of global warming, which they claimed adversely affects their lives, living conditions and health. They complained that the Swiss Confederation had failed to fulfil its duties under the Convention to protect life effectively (in violation of Article 2) and to ensure respect for their private and family life, including their home (in violation of Article 8). They further complained that they had not had access to a court within the meaning of Article 6(1) of the Convention, alleging that the domestic courts had not properly responded to their requests and had given arbitrary decisions affecting their civil rights as concerned the state's failure to take the necessary action to tackle the adverse effects of climate change. Lastly, the applicants complained of a violation of Article 13 (right to an effective remedy).

3. 3. Decision of the Court

Legislative lacunas in Swiss law in 2020 and 2021, and after 2024 were found incompatible with the requirement of the existence of general measures specifying the respondent state's mitigation measures in line with a net neutrality timeline. In addition, the Court assessed that the laws that were in force in between these unregulated periods, although they did set up GHG emission reduction goals, were not adequately implemented. Thus, the targets were missed, which points to the state's failure to adopt effective, specific implementation measures. Furthermore, the new regulation under the Climate Act also did not satisfy the Court's scrutiny because it only set out general objectives and targets and did not provide clear timelines and intermediate targets, as well as any concrete measures. Finally, even though

the states were afforded a wide margin of appreciation regarding specific measures and methods of their climate policies, the absence of any domestic measure envisaged to quantify Switzerland's remaining carbon budget clearly did not satisfy the general regulatory obligation. In conclusion, the Court found that Switzerland failed to meet its positive obligations, violating Article 8 of the Convention.[50] The Court also found a violation of Article 6(1) of the Convention in respect of the applicant association. Its right of access to a court was restricted in such a way and to such extent that the very essence of the right was impaired. Given its findings under Article 6(1) of the Convention, the Court did not find it necessary to examine the applicant association's complaint separately under Article 13 of the Convention.

4. Comments on the Merits

4.1. The existence, scope and nature of the substantive obligations. The trajectory of the 'living instrument' doctrine

Every assessment of responsibility for a violation of the ECHR begins with determining the existence and scope of a normative obligation incumbent on the state. In the commented judgment, these considerations were combined with the analysis of the admissibility of the application *ratione materiae* under Article 2 and Article 8 of the Convention.

As already noted, the application concerned potential state responsibility for violations of the rights and freedoms guaranteed by the Convention resulting from the lack or inadequate response to the adverse effects of climate change. For the sake of clarity, we should remember that the ECHR does not guarantee a free-standing right to a clean and healthy environment;[51] as such, it does not explicitly provide for a right to health either.[52] However, a noticeable and steady rise in traditional environmental cases filed before the ECtHR has, in fact, read the right to a healthy environment

50 The Court decided not to examine the case from the perspective of Article 2 because the principles developed under that Article are, by and large, similar to those developed under Article 8.

51 It is explicitly enshrined, for example, in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador'), 17 November 1988, O.A.S.T.S. No. 69, 28 I.L.M. 161.

52 In the Council of Europe treaty framework, it is guaranteed primarily in the European Social Charter (18 October, 1961, 529 U.N.T.S. 89) and Revised European Social Charter (3 May 1996, CETS No. 163).

into the Convention, which illustrates well the idea of the Convention being 'a living instrument (...) which must be interpreted in the light of present-day conditions'.[53] In other words, the environment is protected 'by proxy', through a nexus between the negative impact and harm the deterioration of the environment has on the enjoyment of rights and freedoms safeguarded by the Convention.[54] The novelty of the three cases decided on 9 April 2024 brought into the already well-established jurisprudential landscape was their subject matter, which, *prima facie,* seemed similar to environmental cases, but at closer inspection brought a number of complex questions to address.

Article 2 ECHR may be applicable even if the person concerned (a direct victim) did not die when there is a real and imminent threat/risk to the right to life.[55] The UN Human Rights Committee (HRC) takes up a similar approach, recalling that the obligation of states parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.[56] In *Daniel Billy and Others v. Australia* the Committee did not find a violation of the right to life, but did not exclude that negative effects of climate change may be regarded as 'reasonably foreseeable' threat to the right to life.[57] However, that depends on the specific circumstances of the case and of available evidence. In *Teitiota v. New Zealand,* the HRC indicated that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.[58] It recognized that in 'certain places, the lack of alternatives to subsistence livelihoods may place individuals at

53 Since its formulation in the *Tyrer v. the United Kingdom* (no. 5856/72, judgment of 25 April 1978, para. 31), the doctrine has spread throughout the Strasbourg case-law and has formed the basis for an evolutionary and dynamic interpretive approach. See further: Letsas, "The ECHR as a Living Instrument", 106-41.

54 For pre-*KlimaSeniorinnen* reflections see c.f.: Fitzmaurice, "The European Court of Human Rights", 141-151.

55 This has already been acknowledged in the previous case-law, e.g. in cases *Kolyadenko and Others v. Russia,* no. 17423/05 et al, judgment of 28 February 2012; *Budayeva and Others v. Russia*, no. 15339/02 et al, judgment of 20 March 2028; *Fadeyeva v. Russia*, no. 55723/00, judgment of 9 June 2005; *Brincat and Other v. Malta,* no. 60908/11 et al, judgment of 24 July 2014.

56 *Toussaint v. Canada*, CCPR/C/123/D/2348/2014, para. 11.3; *Portillo Cáceres et al. v. Paraguay*, CCPR/C/126/D/2751/2016, para. 7.5; *Teitiota v. New Zealand,* CCPR/C/127/D/2728/2016, para. 9.4.

57 *Daniel Billy and Others v. Australia*, CCPR/C/135/D/3624/2019.

58 A citizen of Kiribati filed a communication with the UN Human Rights Committee claiming that New Zealand had violated his right to life by denying him asylum despite his assertions that climate change made Kiribati uninhabitable. *Teitiota v. New Zealand,* CCPR/C/127/D/2728/2016, para 9.4, with reference to the General comment No. 36 (CCPR/C/GC/36), para. 62.

a heightened risk of vulnerability to the adverse effects of climate change' and that the situation of indigence, deprivation of food and extreme precarity can threaten the right to life, including the right to a life with dignity.[59]

Does the same apply to Europe, taken its still more favourable climate situation, compared to many other parts of the globe? In the *KlimaSeniorinnen* judgment, the ECtHR observed that the real and imminent threat/risk test in the context of climate change 'may be understood as referring to a serious, genuine and sufficiently ascertainable threat to life, containing an element of material and temporal proximity of the threat to the harm complained of by the applicant (emphasis added)'.[60] In climate change cases, the risk will be determined on the basis of compelling scientific evidence that shows a link between climate change and an increased risk of mortality and morbidity of certain populations or vulnerable groups.[61] The Court found that scientific evidence (IPCC reports in particular) sufficiently shows that some populations, such as older persons and persons with chronic diseases, are at the highest risk of temperature-related mortality.

While this is enough to trigger the applicability of Article 2, it may not be sufficient to establish a victim status *ad casum*, in accordance with a rigid test set up by the Court. Some of the criteria overlap; however, the potential victim test is more complex. Victim status will be addressed further in the article. The question of applicability *ratione materiae* is of a more general nature, and when determined, it does not mean that there was a violation in a case at issue.

Regarding the second of the alleged violations, unsurprisingly, the Court recognized Article 8 as applicable in general to climate change cases. It is so because the right to private and family life covers adverse effects of environment's deterioration/nuisance/pollution (actual harm and sufficiently severe potential risks) to an individual's health, well-being and quality of life (it also includes the inability to enjoy ones home).[62] In relation to both actual and future harm, a certain minimum threshold of seriousness/

59 Ibid,. para. 9.9.

60 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 513.

61 Ibid., paras 478, 509-511, 529.

62 C.f. cases referred to in footnotes 4-8 of the article and more recent cases as *L.F. and Others v. Italy*, no. 52854/18, judgment of 6 May 2025. See also ECHR Registry, Guide to the case-law of the European Court of Human Rights – Environment, updated on 15 April 2025, p. 31-50, https://ks.echr.coe.int/web/echr-ks/environment [last accessed 28 May 2025].

severity of the interference/harm has to be reached.[63] It is to be assessed on the basis of, amongst others, the intensity and duration of the nuisance and its physical or mental impact on the applicant's health or quality of life.[64] Regarding the impact on the applicant's health, Article 8 is not limited to a specific and quantifiable harm, but also covers situations of being more vulnerable to various illnesses.[65]

4.2. 4.2. Victim Status. Reassessing the Risk and Harm Test in the Climate Change Context

Victim status was one of the key issues in climate change cases thus far considered by the ECtHR.[66] The victim (*ratione personae* admissibility) criterion has evolved significantly since the adoption of the Convention, and it is an autonomous concept.[67] According to a well-established and evolving case-law, it can cover not only the actual and direct victim, but also the potential victim.[68] To be identified as an actual victim usually does not raise problems, as it applies to persons 'directly affected' by the state's actions or omissions. It covers not only situations when an individual is an addressee of the state's decisions and measures but also when general measures have consequences that directly affect such persons. The direct victim needs to prove that he/she has already experienced harm because of the state's failure to meet its obligations. In environmental pollution/damage cases, victim status is being established on the basis of three basic factors: (1) the minimum level of severity of damage/harm to the applicant's rights, (2) the duration of damage/harm, (3) the existence of a sufficient link between the applicant(s) and particular

63 It is a general test applied to Article 8, but also to Article 3 of the Convention, although of course the threshold for Article 8 is lower.

64 *Çiçek and Others v. Turkey*, no. 44837/07, decision of 4 February 2020, para. 22.

65 *Jugheli and Others v. Georgia*, no. 38342/05, judgment of 13 July 2017, para. 71.

66 Apart from two cases already referred to (*Carême v. France*, [GC], no. 7189/21, decision of 9 April 2024; *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], no. 39371/20, decision of 9 April 2024), recently decided cases: *Engels and Others v. Germany*, no. 46906/22, decision of 1 July 2025; *De Conto v. Italy and 32 Others*, no. 14620/21, decision of 7 May 2025; *Uricchio v. Italy and 31 Others*, no. 14615/21, decision of 7 May 2025.

67 Letsas, "The Truth in Autonomous Concepts", 279-305; Schabas, *The European Convention*, 737-745.

68 With notable historical key-cases as: *Klass and Others v. Germany*, no. 5029/71, judgment of 6 September 1978; *Dudgeon v. the United Kingdom*, no. 7525/76, judgment of 22 October 1981.

nuisance/environmental damage.[69] Medical and other expert evidence is required to prove negative consequences on the enjoyment of private, family life and home (e.g. expert studies and/or medical opinions concerning noise level or air pollution and their negative impact on the applicant's health and well-being).[70] However, such evidence does not necessarily have to concern the applicant directly. It may be sufficient to provide a 'strong combination of indirect evidence and presumptions' of adverse effects of pollution/environmental degradation.[71]

In *KlimaSeniorinnen*, the problem was more complicated, as the case concerned the recognition of the applicants as victims. It has already been established in environmental cases that Article 8 is triggered not only in instances of actual damage to the health or well-being but also by the risks of such harm, under the condition that such risks present a sufficiently close link with the enjoyment of the rights under this provision.[72] It is not enough to rely on mere suspicion or conjecture. The potential victim has to provide reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur in the future. While this may be problematic even for individuals, in *KlimaSeniorinnen*, another problem emerged, the question of whether being a member of a group 'class of people' particularly negatively affected by climate change is enough (or would be in future cases) to claim victim status. Similar dilemmas arise in the context of migration and the non-refoulement principle, where applicants sometimes rely on the fact of being members of a persecuted minority/social group or

69 C.f. *Borysiewicz v. Poland*, no. 71146/01, judgment of 1 October 2008, paras 51-53; *Fägerskiöld v. Sweden*, no. 37664/04, decision of 26 February 2008; *Di Sarno and Others v. Italy*, no. 30765/08, judgment of 10 January 2012, para. 80; *Tătar v. Romania*, no. 67021/01, judgment of 27 January 2009, paras 95-97; *Pavlov and Others v. Russia*, no. 31612/09, judgment of 11 October 2022, paras 64-70.

70 In *Smaltini v. Italy* (no. 43961/09, decision of 24 March 2015, paras 56-61), no causal link had been established between the pollution from a steelwork and the applicant's illness. In *Hatton v. United Kingdom*, the burden of proof was shifted and has led the Court to the conclusion that "in the absence of any serious attempt to evaluate the extent or impact of the interferences with the applicants' sleep patterns, and generally in the absence of a prior specific and complete study with the aim of finding the least onerous solution as regards human rights, it is not possible to agree that in weighing the interferences against the economic interest of the country" (no. 36022/97, judgment of 2 October 2011, para. 106).

71 *Fadeyeva v. Russia*, no. 55723/00, judgment of 9 June 2005, paras 79-88. See also *Tătar v. Romania*, no. 67021/01, judgment of 27 January 2009, paras 104-105; *Locascia and Others v. Italy*, no. 35648/10, judgment of 19 October 2023, paras 127-130.

72 C.f. *Jugheli and Others v. Georgia*, no. 38342/05, judgment of 13 July 2017, para. 71; *Giacomelli v. Italy*, no. 59909/00, judgment of 2 November 2006, paras 39-40.

in danger of generalised violence.[73] Victimhood is in these contexts even more closely related to the choice and quality of evidence. Further questions emerge: Should a member of a group that is particularly at risk (according to scientific expert evidence, statistics, etc, even though the person may not yet have experienced harm to such a degree) be required to provide further evidence? Should individual applicants be required to prove a direct causal link between climate change and its negative consequences on their health and well-being? Or is it enough to prove causality on the basis of general, scientific or statistical evidence?

Disappointingly, it is not. According to the Court, this could mean that virtually anybody would count as a potential victim, which does not seem to be justified and substantiated by current scientific evidence. If the Court intended to narrow the criteria for potential victim status in climate change cases, it could have applied a more elaborate (sophisticated) group disaggregation. For instance, as for present-day conditions and available scientific evidence, not all older persons are to be regarded as potential victims, but older persons with certain diseases or disabilities (e.g. cardiovascular disease or asthma) who are exposed to certain climate change negative consequences observed in a given region/country/area (e.g. heatwaves). It cannot be excluded that in the future, groups at risk will be broader, or eventually, everyone (which includes also future generations) will be at risk.[74]

In *Klimasenniorinnen*, the Court decided to apply a rigid individualized risk test instead, requiring the existence of a real risk of a 'direct impact' on the applicant.[75] The risk of adverse consequences of climate change (resulting from state's action or inaction) on the individual(s) is supposed to be determined on the basis of its 'particular level and severity' (with a threshold being 'significant') and a 'pressing need to ensure the applicant's individual protection'.[76] In comparison, instead of a 'direct impact' requirement, the UN Human Rights Committee in *Teitiota v. New Zeland* established a slightly lower threshold of 'a real and reasonably foreseeable risk that [the applicant]

73 C.f. *M.A. v. Switzerland*, no. 52589/13, judgment of 18 November 2014; *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, judgment of 28 June 2011.

74 This leads us back to the issue of associations acting on behalf of victims (such as future generations) who are unable to do so, see Letsas, "Did the Court in KlimaSeniorinnen", online.

75 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 486.

76 Ibid., para. 487 and 527.

would be exposed to a situation of indigence, deprivation of food and extreme precarity that could threaten his right to life, including his right to life with dignity' (para 9.9).

The ECtHR elaborated the risk test, setting up a non-exhaustive list of criteria (factors) to be taken into account when establishing victim status in climate change cases: (1) prevailing local conditions; (2) individual specificities and vulnerabilities; (3) the nature and scope of the applicant's complaint; (4) the actuality/remoteness and/or probability of the adverse effects of climate change in time; (5) the specific impact on the applicant's life, health and well-being; (6) the magnitude and duration of the harmful effects; (7) the scope of the risk (localized or general); (8) the nature and of the applicant's vulnerability.[77] A careful reading of these factors leads to a reflection that some of them overlap (vide criterions no 1 and 7) and are ambiguous. While some are, in fact, general in nature and require solid scientific evidence (such as criterion no 4), the other require individualised assessment (criteria no. 5 and 8).

As a consequence, does it mean that an older person with a chronic disease(s), living in an endangered area will still need to provide further (medical or other) evidence that his/her health and well-being deteriorated because of the adverse effects of climate change? The question is relevant, as proper understanding of the said risk test and impact threshold is fundamental from the procedural point of view.

The judgment indicates that the potential victim needs to provide two types of evidence (prove a causal link): (1) that a risk meets a certain threshold, (2) a causal link between the said risk and state's failure to fulfil positive obligations.[78] Important questions that arise at this point are what a 'certain threshold' means (imminent serious harm to health, probable harm to well-being, etc) and what kind of positive obligations are expected from states (to prevent risk, to minimize risk, to mitigate, to adapt). Regarding the first type of evidence, the Court had no doubts that the currently available scientific evidence is cogent and shows an increase in mortality and morbidity, especially affecting vulnerable groups.[79] Causation and

77 Ibid., para. 488.

78 Ibid., para. 238. See generally on causation in the context of positive obligations in: Stoyanova, *Positive Obligations Under the European Convention on Human Rights. Within and Beyond Boundaries,* 45 et seq.

79 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 478.

the standard of evidence will be addressed in more detail in another section of the article.

While the Court applied these tests and standards to individual applicants in the case at issue,[80] it is unclear why it did not make the same analysis concerning members of the association acting as their representative. It merely noted that it is a group of more than 2,000 females who live in Switzerland and whose average age is 73, and concluded that the association had *locus standi*.[81] Regarding the individual applicants, even though they were found to belong to a group (older women) which is particularly susceptible to the effects of climate change, additional individualized assessment had to be undertaken, according to the 'climate change victim status test'. These applicants had to show their individual vulnerabilities and medical records to prove the actual or future negative impact of heatwaves on their health. In the Court's opinion, they failed to show that they suffered from any critical medical condition that could be aggravated by heatwaves. They also failed to prove that available adaptation measures (of general or personal character) were insufficient to prevent their health from deteriorating caused by heatwaves. While the final outcome of the Court's assessment may be correct, the fundamental question remains, why was an individualised assessment applied only to individual applicants, and not to the members of the applicant association? It may lead to a simple conclusion that it would be very difficult for individual applicants to meet the victim status requirements, and if the same persons were members of an association, a less rigid test would apply. This raises a question: Is there a well-reasoned justification for such a double standard?

4.3. Identification of an Internationally Wrongful Act and Attribution of Responsibility

The *KlimaSenniorinen* case concerned the alleged inaction and omissions of the Swiss government, in other words, a failure to meet positive

80 Ibid., paras 527-535.

81 Ibid., para. 521. The Court's decision to grant *locus standi* does not raise any doubts and is well-reasoned. It is clear that the association did not act in its own name (as a victim), but was genuinely qualified and representative to act on behalf of its identifiable (not anonymous) members. On the domestic level, it helped its members in defending their rights and interests, given the fact that there were no domestic remedies available for individual applicants in Switzerland.

obligations. The essence of substantive positive obligations lies in being active, not passive; that is, in adopting relevant legislative, administrative and other measures to provide effective protection and enjoyment of human rights and freedoms[82] (in the case at issue: life, health and well-being). State responsibility related to this type of obligation centres on the concept of risk and how the state anticipates and deals with risks.[83] In the context of climate change, a difficulty, compared with environmental cases, was to determine how the state's inaction or insufficient action negatively impacted the applicant's rights and what states are expected to do. The judgment indicates that positive state obligations vis-à-vis adverse effects of climate change on health, well-being and quality of life are twofold and concern (4.3.1.) mitigation measures and (4.3.2.) adaptation measures.

4.3.1. Mitigation

Described as a primary duty to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing, as well as potentially irreversible future effects of climate change. What kind of regulations and measures are classified as mitigation? The ones that aim at preventing an increase and accumulation of GHG in the atmosphere and a rise in global average temperatures beyond levels capable of leading to serious and irreversible adverse effects on human rights.[84] At this point, the margin of appreciation doctrine comes into play.[85] As pointed out elsewhere in the article, when setting up goals and objectives of climate policy, states enjoy a reduced margin of appreciation. In deciding how these objectives are to be achieved, thus, in adopting specific measures, Switzerland (as well as other states-parties to the ECHR) is afforded a wide margin.

Relying on the international commitments and scientific data, the Court set up a general duty (goal) for all states-parties to the ECHR to undertake

82 Stoyanova, ibid., 171-217; Gerards, *General Principles of the European Convention on Human Rights*,108-132; Morawska, *Zobowiązania pozytywne państw-stron Konwencji o ochronie praw człowieka i podstawowych wolności,* 250-254.

83 Stoyanova, ibid., 33-39.

84 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, paras 545-546.

85 The doctrine allows for some flexibility in applying the Convention, and it is closely interrelated with the principle of subsidiarity, among the vast scholarship on the doctrine see: Macdonald, "The Margin of Appreciation", 83-124; Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, passim.

a substantial and progressive reduction of their GHG emissions, aiming at net neutrality within the next three decades (with a softening phrase 'in principle').[86] Since this goal cannot be achieved at the last moment and all of a sudden, the Court 'motivated' states and obliged them to adopt and implement coherent climate policy with adequate intermediate reduction goals, targets and timelines in binding domestic regulations (as opposed to voluntary commitments), and to ensure effective implementation.[87] Furthermore, states will be obliged to provide evidence that they comply or are in the process of complying with these targets.[88] Clearly, this duty is to disable a state's line of defence based on the argument that there is a lack of established methodology and objective evidence to determine a country's carbon budget.[89] This shift of the burden of proof will be extremely welcome to future applicants. Also, states will have to put in place adequate self-monitoring mechanisms and collect relevant data. Lastly, climate policies should not be static and inflexible. states have a duty to keep GHG targets updated with.[90]

4.3.2. Adaptation

Adaptation measures should be undertaken as quick solutions to the most pressing needs and challenges. However, they may only alleviate the symptoms, not cure the cause of disease, therefore they only supplement mitigation measures that are state's primary duty.[91]

When analysing a state's positive obligations and attribution of responsibility, the Court stated that states '(...) have committed themselves – in accordance with their common but differentiated responsibilities and their respective capabilities – to take the necessary mitigation measures (to reduce GHG emissions) and adaptation measures (to adapt to climate change and reduce its impacts)'.[92] Since Switzerland failed to act and adopt adequate measures, therefore its responsibility originates from omissions. The Swiss government admitted that it did not manage to meet its declared climate

86 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para 548.
87 Ibid., para 549, 550.
88 Ibid., para 550 c.
89 Ibid., para 570.
90 Ibid., para 550 d.
91 Ibid., para 552.
92 Ibid., para 478.

objectives (goals), and that the GHG emissions have in fact increased during the COVID pandemic. This mere fact, however, does not help in determining to what extent the Paris Agreement and UNFCCC should be taken into consideration when interpreting the ECHR and analysing the nature and specific scope of state obligations. Are these instruments to be regarded as context for ECHR interpretation under the VCLT?[93] While international *corpus juris* for the protection of the natural environment may serve as a wider interpretative context,[94] this does not prevent the ECtHR from developing the autonomous Convention's standard. In other words, the fact that the Paris Agreement does not provide for specific obligations binding on states does not preclude the possibility of establishing positive obligations on the basis of the ECHR. To argue otherwise would lead to the conclusion that in interpreting the ECHR, the Strasbourg Court is constrained by international environmental law, largely voluntary and non-binding goals (or even by the possible lack of such commitments in the future). What if states refrain from making similar voluntary commitments in the future? Would it prevent the ECtHR from establishing state responsibility?

Even though climate change is a global and transboundary challenge, states may still be held responsible for the conduct attributable to them according to the rules of international State responsibility. In *KlimaSeniorinnen*, the ECtHR for the first time relied on a principle of common but differentiated responsibilities[95] and respective capabilities of states stemming from international environmental agreements.[96] The concept of concurrent/shared responsibility is not new to the ECtHR jurisprudence; however, it is not the same as the principle of common but differentiated responsibilities (CBDR).[97] The former relates to a situation when two or more states contribute

93 Fitzmaurice, "Interpretation on Human Rights Treaties", 746-752; Rachovitsa, "The Principle of Systemic Integration in Human Rights Law", 557–88.

94 The *Taşkin* and *Tătar* judgments (ibid.) indicated a readiness of the ECtHR to take relevant international environmental treaties in the process of interpretation.

95 The principle can be traced in some international treaties, e.g.: Article 19(3) of the Constitution of the International Labour Organization (ILO); Article 61 and 62 of the United Nations Convention on the Law of the Sea; but is particularly visible in the field of environmental law, vide e.g. Principle 7 of the Rio Declaration, Article 3 (Principles), paragraph 1 of the United Nations Convention on Climate Change; Article 3(1) Kyoto Protocol; Article 20(4) and Article 21 of the Convention on Biological Diversity.

96 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 442.

97 *M.S.S. v. Belgium and Greece*, no. 30696/09, judgment of 21 January 2011, para. 264, 367. See also: Nollkaemper and Plakokefalos, "The Practice of Shared Responsibility: A Framework

to the same internationally wrongful act (or jointly breach obligations), they may bear concurrent legal responsibility for the harm. In that case, applicants claim that their Convention rights were violated by more than one state. The Court then determines the share of responsibility of each state for alleged breaches of Convention rights.[98] The latter developed in environmental law and refers to the principles of international law concerning the plurality of responsible states, according to which the responsibility of each state is determined individually, on the basis of its own conduct and by reference to its own international obligations.[99] The CBDR principle has been relied on by the CRC Committee in *Sacchi et al. v. Argentina* and several other states, where the Committee observed that 'the collective nature of the causation of climate change does not absolve the state party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location'.[100] Put simply, states cannot be absolved from responsibility by arguing that actions of individual states will not make a real change to the global challenge or that other states also do not fulfil their obligations.

In connection to this, it is important to note that one of the points questioned by the Swiss government was responsibility for different sources of GHG emissions: a) emissions originating from the territory of Switzerland ('domestic emissions') and b) 'embedded emissions', emissions originating outside its territory that could be indirectly attributed to Switzerland (connected with importing goods). The latter source of emissions was argued by the government to fall outside any of the exceptional criteria for establishing the state's extraterritorial jurisdiction.[101] The Court did not share this argument, anchoring state jurisdiction on the fact that all applicants were residents of Switzerland, experiencing negative effects of climate change on their Convention rights. In other words, it had no

for Analysis", 1-12; Hey and Paulini, "Common but Differentiated Responsibilities", online.

98 See cases concerning expulsion and extradition (*M.S.S. v. Belgium and Greece*, no. 30696/09, judgment of 21 January 2011, paras 264 and 367; *Shamayev and Others v. Georgia and Russia*, no. 36378/02, judgment of 12 April 2005), protection from trafficking (*Rantsev v. Cyprus and Russia*, no. 25965/04, judgment of 7 January 2010) or child custody (*Furman v. Slovenia and Austria*, no. 16608/09, judgment of 5 February 2015).

99 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (commentary on Article 47).

100 CRC/C/88/D/104/2019, para. 10.10. The claim was declared inadmissible because of the non-exhaustion of domestic remedies, but the Committee found that Argentina had jurisdiction.

101 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 284.

bearing on state's jurisdiction where the emissions were produced (*ratione loci*) because what mattered was that the applicants (victims) were under its territorial jurisdiction. The question of Switzerland's responsibility for 'embedded emissions' was, therefore, analysed not as a jurisdictional matter but as an issue of responsibility. The issue of the extraterritorial application of human rights is particularly germane to the context of climate change[102] and will surely have to be addressed and elaborated by the Court in the future.[103] This *prima facie* jurisdictional and admissibility issue involves, in fact, a deeper and more profound second layer of "extraterritorial balancing" of different (national and non-national) interests.[104]

4.4. Causation, Evidence and Burden of Proof

There is no doubt that causation and evidence are crucial in climate litigation. In particular, scientific evidence plays an important role, not only with regard to causation and state responsibility, but also in interpreting the Convention and reconstructing a general standard, e.g. the nature and scope of states' duties.[105] Even though scientific and expert evidence was relied upon already in environmental cases[106] or in some other context related to new

102 Keller and Pershing, "Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases", 23-46.

103 In the *Duarte Agostinho* inadmissibility decision, the Court agreed with the applicants' argument that states have control over the activities within their territories that contribute to greenhouse gas emissions and there is a certain causal link between those activities and the transboundary human rights impact. The Court, however, found 'that these considerations could not in themselves serve as a basis for creating by way of judicial interpretation a novel ground for extraterritorial jurisdiction or as justification for expanding on the existing ones' (ibid., para. 195). In contrast, a novel approach to extraterritorial jurisdiction has been adopted by the IACtHR (Advisory Opinion OC-23/17) and HRC (*Saachi* case, ibid.).

104 Stoyanova, ibid., 293-299.

105 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 546.

106 For example, in *Öneryıldız v. Turkey* (no. 48939/99, judgment of 30 November 2004), the ECtHR acknowledged the state's liability for a methane explosion at a municipal waste site, relying on expert reports to establish a causal link between negligence and loss of life. Similarly, in *Tătar v. Romania*, the Court recognized Romania's failure to prevent environmental harm linked to cyanide pollution, emphasizing the precautionary principle and reliance on scientific assessments. Moreover, the Court has recognized the importance of independent scientific inquiry, as seen in *Cordella and Others v. Italy* (nos. 54414/13 and 54264/15, judgment of 24 January 2019), where Italy was held accountable for failing to address industrial pollution despite extensive scientific evidence documenting health risks.

technologies,[107] climate change litigation presents a greater challenge for causal inquiry due to its complex, multi-actor nature.[108]

In the existing Court's case-law in environmental matters, a causal link between a specific source of harm and the actual negative effects on individuals or groups is, in general, determinable and easier to establish.[109] In the case of climate change claims, the major difficulty is that there is no single or easily measurable source of harm emanating from one state, such as a polluting factory or mine. However, this does not mean that states can be automatically absolved from responsibility. Even if the negative impact of their actions and/or omissions cannot be accurately measured, science offers more and more precise tools to identify sources of threat (such as GHG emissions) and to what extent the risk is susceptible to mitigation. As observed by Nollkaemper: 'The key to solving causation puzzles in relation to the determination of responsibility for climate change harm is that courts apply causation tests in close connection with the applicable substantive obligations'.[110]

107 Most often the Court referred to "scientific evidence" in the context of particular evidence conducted for the purposes of domestic investigations, e.g. when applicants sought by means of judicial proceedings to rebut the legal presumption of his paternity on the basis of biological evidence (DNA test) or when forensic DNA evidence appeared in criminal proceedings. C.f. *Mizzi v. Malta*, no. 26111/02, judgment of 12 January 2006; *Tavlı v. Turkey*, no. 11449/02, judgment of 9 November 2006; *Doktorov v. Bulgaria*, no. 15074/08, judgment of 5 April 2018; *Horncastle and Others v. the United Kingdom*, no. 4184/10, judgment of 16 December 2014.

108 Also, other examples from the Court's jurisprudence suggest a trend towards integrating scientific evidence into legal reasoning. In *Vavřička and Others v. the Czech Republic* (no. 47621/13 et al, judgment of 8 April 2021), the Court, when discussing the necessity and proportionality of the interference, took notice of extensive scientific evidence presented by the government that early childhood is the optimum time for vaccination. In *Macatė v. Lithuania* (no. 61435/19, judgment of 23 January 2023) scientific evidence was decisive in determining the child's best interests. Lack of scientific evidence or sociological data suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children allowed the Court to find a violation of the Convention. Finally, growing reliance on scientific evidence inevitably raises questions about the quality and methodology of such research and whether and how international courts could perform an effective judicial review of scientific activities. These concerns may be traced in *Pasquinelli and Others v. San Marino* (no. 24622/22, judgment of 29 August 2024) and *Semenya v. Switzerland* (no. 10934/21, judgment of 10 July 2025) .

109 Stoyanova distinguishes two sources of harm: natural and man-made (ibid., 58 et seq.). In climate change cases, this distinction is not that clear-cut, since climate change is a complex phenomenon of anthropogenic root-causes (GHG emissions) resulting in "natural" disasters such as droughts, floods, ocean water rise and heatwaves.

110 Nollkaemper, "Causation Puzzles In International Climate Litigation", 37.

Different types of causal inquiry and evidence identified in the judgment[111] that may be essentially divided into two levels (1) a general level: nexus between GHG emissions and GHG accumulation in the atmosphere and their effect on climate (e.g. rise of global temperatures); what are the consequences of climate change (e.g. heatwaves, floods, droughts) globally and locally; (2) individual/group victim level: a link between harm or risk of harm to the enjoyment of human rights and the acts or omissions of state authorities. It seems unclear why the Court decided to add a third level (dimension): a link between the various adverse effects of the consequences of climate change, and the risks of such effects on the enjoyment of human rights at present and in the future. Does this mean that a separate standard of proof should apply in this context? If the Court had in mind the general consequences on human life, health and well-being, these are subject to non-individualised scientific assessment and statistical evidence.

Anthropogenic climate change is a scientific fact, and this has not been questioned by the Swiss government. Its profound and serious consequences for human beings and the natural environment were presented relying on various reports and international instruments.[112] Available scientific data and analysis provide reliable information regarding current and future risks, most affected areas, regions, groups, etc.[113] Looking for scientific guidance, the ECtHR relied on studies and reports by relevant international bodies and, in particular, on the IPCC reports. The IPCC 2018 Special report '1.50C global warming' indicated that any increase in global temperature (such as +0.50C) was projected to affect human health, with primarily negative consequences (*high confidence*). Lower risks were projected at 1.50C than at 20C for heatrelated morbidity and mortality (*very high confidence*), and for ozonerelated mortality if emissions needed for ozone formation remained high (*high confidence*).[114] These data and estimates were repeated and updated in other reports, such as AR6 'Synthesis Report: Climate Change 2023'.[115] It may be concluded that with regard to this level of inquiry,

111 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 425.

112 Ibid., para 103-113.

113 UN Secretary-General Report "The impacts of climate change on the human rights of people in vulnerable situations", A/HRC/50/57, 6 May 2022.

114 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 107.

115 Ibid., paras 114-120.

a general standard of proof 'beyond reasonable doubt' has been met.[116] The ECtHR does not require scientific certainty, similarly to its Inter-American counterpart.[117] It seems obvious that the question of the accumulation of GHG in the atmosphere and its consequences is a matter of scientific knowledge and assessment. There is a danger for future climate change litigation that, in an unfavourable political situation, states will not finance solid, objective research and climate monitoring, which will eventually have to rely on private funds and civil society or on international organisations. The essence of the difficulty when analysing causation seems to lie in presenting evidence to what extent individual states contribute to the negative effects and consequences of GHG emissions.

The Swiss government argued that there is a lack of established methodology and objective evidence to determine a country's carbon budget, which makes it difficult to adopt and effective regulatory framework. The Court rejected this argument, referring to the principle of common but differentiated responsibilities under the UNFCC and the Paris Agreement.[118] This principle requires states to act on the basis of equity and in accordance with their own respective capabilities. To sum up, in *KlimmaSeniorinnen*, state responsibility was based on estimates (by relevant bodies and experts) of the overall country's GHG footprint. Compared to environmental cases, there does not have to be a specific and identifiable source of harm.

Now moving to the second level of causation and burden of proof, there needs to be a link between harm or risk of harm to the enjoyment of human rights and the acts or omissions of state authorities. The problem that applicants had to face was not to prove that climate change as such exists, but to provide evidence and prove the relationship between state's inaction (and/or inadequate steps) to address these challenges that, in consequence, had a direct negative impact on their rights protected by the ECHR. A question for future litigation remains open: whether statistical and scientific evidence

116 Ibid., para. 542.

117 'States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in the case of potential serious or irreversible damage to the environment, even in the absence of scientific certainty…', vide Inter-American Court of Human Rights, Advisory Opinion OC-23/17 "The Environment and Human Rights", 15.11.2017, para. 242.

118 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 571.

would satisfy the standard of evidence,[119] or whether applicants will be required to provide further evidence, such as personal medical records.

In the commented judgment, the Court dismissed several studies submitted by the applicant association because they were challenged by the government as unreliable. This may explain why some intervening parties suggested that a reversed burden of proof could be used, so that it does not only lie predominantly on the applicants. However, the burden of proof shifts when governments claim that the measures they undertake are sufficient and efficient to protect individuals, they should be required to prove it. It is important to note, that the Court did provide a solution to this problem for the future, as it obliged states to 'provide evidence showing whether they have duly complied, or are in the process of complying, with relevant GHG reduction targets'.[120] This is associated with a presumption that if adequate (reasonable) measures and steps were taken by the state, the harm would most likely not occur or if it did, it would be less severe. It also reflects the need for a precautionary principle,[121] due diligence[122] and impact assessment, which have emerged as the prevalent standards to measure positive obligations, and are especially important in environmental governance.[123]

4.5. Two Margins of Appreciation and Judicial Activism?

The margin of appreciation doctrine does not require an explanation, as its origin and role were extensively discussed in the scholarship.[124] In

119 See for example: OHCHR, 'Analytical study on the promotion and protection of the rights of older persons in the context of climate change' (A/HRC/47/46) of 2021, para. 35. In the study, multiple and intersecting forms of discrimination of older persons were identified, including health risks (such as a greater likelihood of experiencing chronic diseases and air pollution harms, as well as higher mortality rates and other heath complications from extreme heat events).

120 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 370 c.

121 For a convincing practical application of the precautionary principle to environmental policy context see: Roser, "Don't Look Too Far: Rights as a Rationale for the Precautionary Principle", 305-322.

122 Defined usually as the 'appropriate standard' and an obligation to undertake 'reasonable preventive measures/steps'. Shelton and Gould, "Positive and Negative Obligations", 577. It is by no means a uniform standard and is characterized by a differentiation of the diligence level, as observed by Mik, *Theory of Obligations in International Law*, 465.

123 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 444.

124 C.f. Arai-Takahashi, ibid.; Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, passim.

KlimaSeniorinnen, the doctrine was relied upon by the Court to assess if a fair balance between different interests was met. It is clear that the applicant's interest was in the protection of their right to life, health and well-being. It is, on the other hand, implicit that the competing interest was the country's economic well-being, an argument put forward to justify reluctance to make unpopular political decisions.

The case concerned positive obligations, at the centre of the Court's scrutiny was the quality of the legislative process: did the national legislator analyse all interests and needs, as well as carry out impact assessment according to the due diligence principle? In light of the established environmental case law, states enjoy a wide margin of appreciation when adopting legislative and implementation measures.[125] Also in other contexts that engage positive obligations, domestic authorities are, in principle, regarded to be better placed to make operational choices, analyse available resources and balance different interests.[126]

Surprisingly, in contrast with environmental cases, the Court did not refer to a wide margin, but to a 'certain margin of appreciation in this area [climate change]'.[127] Even more surprisingly, the Court distinguished two margins of appreciation: one concerning the 'State's commitment to the necessity of combating climate change and its adverse effect, and the setting of the requisite aims and objectives in this respect', and the other one concerning 'the choice of means designed to achieve those objectives'.[128] In decision-making regarding the former aspect (aims and objectives) states enjoy a reduced margin of appreciation, while with regard to the latter (choice of specific means, policies and operational choices to achieve aims and objectives) they enjoy a wide margin. *Prima facie*, the division of the margin of appreciation may seem redundant; however, it does correspond with the overall Court's reasoning. International commitments and scientific evidence leave less space for manoeuvre when setting up general aims and objectives of domestic climate policies, while state authorities are better

125 *Hatton and Others v. the United Kingdom*, [GC], no. 36022/97, judgment of 8 July 2003, para. 100.

126 It is particularly visible in the area of healthcare: c.f. *Nitecki v. Poland*, no. 65653/01, decision of 21 March 2002; *Sentges v. the Netherlands*, no. 27677/02, decision of 8 July 2003; *Pentiacova and Others v. Moldova*, no. 14462/03, decision of 4 January 2005; *Vasileva v. Bulgaria*, no. 23796/10, judgment of 17 March 2016.

127 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 543.

128 Ibid.

equipped to decide upon specific measures after analysing different factors, interests, capabilities and resources.

Did the ECtHR go too far and extend the limits of judicial activism by overstepping the principle of separation of powers? As might have been expected, the Swiss government, as well as almost all intervening governments, raised objections concerning the principle of subsidiarity and separation of powers. That is why the Court decided to adhere to a 'preventive self-defence' strategy, and highlighted that 'Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government'.[129] However, at the same time, it offered a very detailed recap of the principles and qualitative requirements of the domestic decision-making process,[130] labelling them as 'procedural safeguards available to the individual', which is not clear. It is not self-evident that all these considerations may automatically, and without any modifications, be applied to climate change decision-making. What the Court had in mind were not 'typical' procedural obligations and legal remedies. As explained elsewhere in the judgment, procedural safeguards mean an information obligation towards the general public and affected groups. States are expected to raise awareness about climate change and climate policies, as well as ensure access to relevant studies and scientific evidence.[131] The second procedural safeguard is consultation with the general public and affected groups. In other words, different actors should have an opportunity to present their views and participate in the decision-making process. Both procedural obligations is clearly in line with Aarhus Convention.

129 Ibid., para. 412. As we read further in para. 450 '[...] the Court retains competence, albeit with substantial deference to the domestic policy-maker and the measures resulting from the democratic process concerned and/or the judicial review by the domestic courts'.

130 Ibid., para. 539.

131 Ibid., para. 554.

4.6. Final Remarks – What Is Next?

Given the rather unfavourable political sentiments towards 'green deals' in many countries worldwide,[132] IHRL[133] and constitutional law[134] may become the primary legal avenue for future climate change strategic litigation.[135] Currently available alternative legal basis of claims, such as other international instruments (i.e. Paris Agreement) or domestic legislation, may become obsolete. Even though 161 UN Member States (including 45 CoE Member States) voted in favour of the adoption of the UNGA Resolution on human right to a clean, healthy and sustainable environment,[136] affirming, amongst others, their commitment to implement multilateral environmental agreements under the principles of international environmental law, the future seems to be rather dim. Some states have already withdrawn from relevant treaties (Energy Treaty) or declared to do so in the near future.

The *KlimaSeniorinnen* is undoubtedly a landmark judgment. Even though there is little chance that we will soon see an independent, self-standing universal[137] or European[138] human right to a clean, healthy and sustainable environment,[139] the judgment confirmed that the ECHR may

132 US President Donald Trump has already declared that he is starting the Paris Agreement withdrawal process for the United States, and some EU Member States are taking a firmer stance against the EU Green Deal.

133 With the notable example of a precedent Dutch case: *State of the Netherlands v. Stichting Urgenda*, Supreme Court of the Netherlands, 20 December 2019, ECLI:NL:HR:2019:2007).

134 With the notable example of a German case *Neubauer and Others v. Federal Republic of Germany*, German Federal Constitutional Court of 24 March 2021, 1 BvR 2656/18, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618. See further: Jahn, "Domestic courts as guarantors of international climate cooperation: Insights from the German Constitutional Court's climate decision", 859-883.

135 Human rights law has already been used as a legal basis for claims in many jurisdictions: McAdam and Scissa, "How Domestic Courts", online; Wewerinke-Singh, "The Rising Tide of Rights: Addressing Climate Loss and Damage through Rights-Based Litigation", 537-566.

136 Official Records: A/76/PV.97.

137 To date it has been recognized as such in soft law instruments: Human Rights Council Resolution 48/13 (2021) and UNGA Resolution 76/300 (2022).

138 However, we should take a note that CoE Committee of Ministers has been vested by PACE with the task of drawing up an additional protocol to the European Convention on Human Rights on the right to a safe, clean, healthy and sustainable development, vide Recommendation 2211 (2021), adopted on 29 September 2021. Work on the draft report by the CDDH-ENV began in September 2022.

139 Usefulness and content of such right have been the subject of much intergovernmental and scholarly debate: Woods, *Human Rights and Environmental Sustainability, passim*; Caney, "Climate Change, Human Rights, and Moral Thresholds", passim; Bratspies, "Do We Need

serve as a basis for future litigation before the ECtHR and domestic courts.[140] Applicants from different countries now have a precedent *de facto*, they can rely on before national courts and the ECtHR.[141] Quoting Lord Justice Singh, 'In general, we follow those decisions' (sic!).[142] However, this does not mean that litigation will now be a piece of cake. Firstly, not all applicants will be regarded as direct or even potential victims. Two other major obstacles for successful climate litigation will be the causal inquiry standards and the separation of powers argument in instances when the national legislature and the executive fail to set up climate goals and specific measures to meet them.[143]

The KlimaSeniorinnen case, as well as other climate change cases, clearly show that scientific evidence and the standard of proof are crucial for future climate change complaints.[144] Courts have already relied on the lack of an adequate link between state actions (or inaction) and the requirement of a real and immediate risk to human life and health.[145] In other words, courts may be inclined to refrain from ruling, arguing that climate change cases are to complex and require expert knowledge.[146]

As to the question of whether the ECtHR overstepped the principle of subsidiarity and separation of powers, in my view, this has not been the case. The Court did not impose specific goals, obligations and measures on the state, as this could lead to making the obligation (ECHR standard) unfeasible.[147] What the judgment offered, in essence, is a clear confirmation that the right to a healthy environment (as such) is covered by the ECHR and

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a Human Right to a Healthy Environment", 31-69; Boyd, "Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment", 17-41.

140 Already in a 2017 Advisory Opinion, the IACtHR recognized a freestanding right to a clean and healthy environment under Articles 4 and 5 of the Convention, which guarantee the rights to life and personal integrity (Advisory Opinion OC-23/17 of 15 November 2017).

141 Balcerzak, *Zagadnienie precedensu w prawie międzynarodowym praw człowieka*, 270.

142 UK Court of Appeal, 18 March 2022, CA-2021-003448, para. 5.

143 As in *Greenpeace Spain and Others v. Spain*, Supreme Court of Spain, 24 July 2023, STS 3556/2023, ECLI:ES:TS:2023:3556. See also VZW *Klimaatzaak v. the Kingdom of Belgium and Others*, Court of Appeal, 18 March 2022, CA-2021-003448, ECLI:NL:HR:2019:2007.

144 The importance of scientific progress and evidence was underlined by the interveners: UN High Commissioner for Human Rights and UN Special Rapporteurs.

145 *Nature and Youth Norway and Greenpeace Nordic v. the Ministry of Petroleum and Energy*, Supreme Court of Norway, judgment of 22 December 2020, HR-2020-2472-P, paras 167-168.

146 This was, essentially, the reasoning in the UK High Court of Justice decision in *Plan B Earth and four other citizens v. Prime Minister*, 21 December 2021, [2021] EWHC 3469 (Admin), para. 51.

147 Feasibility (performatibility) of international obligations depends on different legal and extra-legal conditions, vide Mik, *Theory of Obligations in International Law*, 472.

that states have positive obligations to protect the health and life of persons within their jurisdiction from harm resulting from climate change. The Court did not go against the principle of subsidiarity, as it did not set up specific goals, actions and measures or policies to fight climate change.

Even though a clean and healthy environment should be recognised as a common interest of all countries and people, in public and political discourse, it is often juxtaposed with other interests, such as economic well-being, public safety, etc. Climate policies and governance require raising public awareness, fighting disinformation, determination and unpopular political decisions that will balance different interests. Although in the judgment we do not find a direct reference to solidarity,[148] it is evidently reflected in its axiological background: 'policies to combat climate change inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations'.[149] It does not seem appropriate to adopt climate policies in public referendums,[150] as this definitely does not meet the procedural safeguards envisaged in the judgment. As observed in the judgment, '[...] democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the ECtHR is therefore complementary to those democratic processes. The task of the judiciary is to ensure the necessary oversight with legal requirements'.[151] What legal requirements did the Court have in mind? By far and foremost are the ones that oblige states to respect and protect fundamental human rights, such as the ECHR and national constitutions. The *KlimaSeniorrinen* judgment is one of the pieces in the puzzle of international climate change litigation[152] that

148 2020 Report submitted to the Human Rights Council, "International solidarity and climate change, A/HRC/44/44.

149 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 419.

150 Vide Swiss Referendum concerning the Environmental Responsibility Initiative that was held on 9 February 2025: https://www.admin.ch/gov/en/start/documentation/votes/20250209/environmental-responsibility-initiative.html [last access 27.07.2015].

151 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, judgment of 9 April 2024, para. 412.

152 Followed by: Advisory Opinion on the obligations of states under international law to protect the climate system and the environment, Advisory Opinion, 23 July 2025; ITLOS, Advisory Opinion on climate change and the law of the sea, ITLOS Case No. 31, delivered 21 May 2024; IACHR, Advisory Opinion OC-32/25 on Climate Emergency and Human Rights, adopted 29 May 2025.

provides avenues to enforce states' international obligations and put pressure on states.[153]

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153 Quoting the judgment: '(...) given the necessity of addressing the urgent threat posed by climate change, and bearing in mind the general acceptance that climate change is a common concern of humankind (emphasis added), there is force in the argument put forward by the UN Special Rapporteurs that the question is no longer whether, but how (emphasis added), human rights courts should address the impacts of environmental harms on the enjoyment of human rights.' (para. 451).

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